

I find that the trial judge was right in holding that there was a contract between the parties. The appellant had offered the price of \$37 per ton. This was accepted by the respondents who had placed an order for 2,000 tons to be shipped by "Sandakan Bay" which was to arrive at Sibu by the 20th of October.

Until the letter of the 18th September the appellant had agreed to the price of \$37 per ton and had agreed to ship 2,000 tons of logs by the "Sandakan Bay" by the 20th October. The condition in the letter of credit against partial shipment was as the respondents had submitted to "make explicit what was once implicit." It was not a new term of the contract. On the contrary to insist as the appellant did on a condition in the letter of credit allowing partial shipment would be to introduce something which had not been agreed to either expressly or by implication. The probable explanation for this manoeuvre on the part of the appellant would appear to lie in the increased price of logs at the time. It might have occurred to him that at \$37 a ton he would incur a loss in the transaction. This is borne out by his cable Ex.A.7 giving the increase in the price as the main reason for his withdrawal of his offer, and again by his letter of the 2nd October, 1965 translation whereof Ex.17, he appeared to have dropped the pretence that there was any disagreement over the matter of the partial shipment. It would seem that had the respondents agreed to the increased price of \$40 the appellant would have raised no difficulty.

The appeal is dismissed with costs here and in the court below.

Azmi L.P. and MacIntyre F.J. concurred.

Appeal dismissed.

ANG HUA BEE v. LEONG MIAW YU

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & MacIntyre F.J.) January 30, 1969]

[Kuching—Federal Court Civil Appeal No. X.12 of 1968]

Landlord and Tenant — Rent controlled premises — Recovery of possession — Receipt of subletting rent in excess of 75% — Party not precluded from relying on ground not raised in court below — Exercise of discretion — Control of Rent Ordinance (Sarawak, Cap. 86) s. 15(1)(a) & (j).

Practice and Procedure — Appeal — Point not taken in court below — Circumstances when not precluded.

The appellant brought an action for the recovery of rent controlled premises under paragraphs (a) and (j) of section 15(1) of the Control of Rent Ordinance. It was found that rent had been tendered before the expiration of 21 days after the date of notice of demand.

A The learned magistrate rejected the claim under section 15(1)(a). He held that he had a general discretion under section 15, and exercising the discretion he would not order possession under section 15(1)(j) as the appellant had come to court with unclean hands.

B The appellant appealed to the High Court, but the issue of whether the learned magistrate had discretion was not raised. The High Court dismissed the appeal, and in an appeal to the Federal Court,

Held, dismissing the appeal: (1) as a general rule, a point not raised in the court below cannot be considered on appeal, but in cases relating to the jurisdiction of the court to order possession, the fact that a point was not taken in the court below does not preclude the tenant from relying on it;

C (2) there is no jurisdiction for the exercise of discretion where possession is claimed under section 15(1)(j) of the Control of Rent Ordinance;

(3) in the absence of evidence of what the standard rent of the premises was, possession of premises under section 15(1)(j) could not be ordered.

Cases referred to:—

- D (1) *Davies v. Warwick* [1943] 1 All E.R. 309.
- (2) *Selwyn v. Hamill* [1948] 1 All E.R. 70.
- (3) *Jackson Development Ltd. v. Stemp* [1943] 2 All E.R. 601.
- (4) *Tham Sai Mooi v. M.S. Thaver* [1954] M.L.J. 187.
- E (5) *T. Mohamed v. V.E.A. Mohaideen* F.M. Civil Appeal 20 of 1952, unreported.
- (6) *Chen Chi Wei v. Khoh Keng Chong* [1951] M.L.J. 204.

FEDERAL COURT.

Appellant in person.

T.O. Thomas for the respondent.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): This is an appeal against the decision of the High Court at Kuching affirming a judgment of the stipendiary magistrate at Kuching who dismissed the appellant's claim against the respondent for repossession of controlled premises No. 9 Court-house Road, Kuching, hereinafter called the premises.

G The appellant's claim was based on section 15(1)(a) and section 15(1)(j) of the Control of Rent Ordinance. Section 15(1) thereof is as follows:—

"No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases:—"

two whereof are section 15(1)(a) which reads:—

I "Where at the date of notice determining the tenancy given by the landlord rent lawfully due was in arrears for twenty-one days or upwards after demand in writing and there was no tender thereof at or before such date."

and section 15(1)(j) which reads:—

"Where the tenant having sublet the premises or part thereof receives in respect of such subletting rents

(excluding any lighting and Municipal or local authority services paid by the tenant) which exceed in the aggregate seventy-five percent of the rent paid by the tenant."

The main controversy between the parties turns on the amount of the rent of the premises. However, assuming for the purpose of dealing with the claim under section 15(1)(a) that the monthly rental was \$45 the position as at the end of September 1965 was this. The appellant by his letter of the 28th December 1965 Ex. A.6 demanded rents for the months of October and November. Some correspondence followed regarding the deduction of the rents from a sum due to the respondent from the appellant by way of costs which is not material. However, on the 10th February 1966 the respondent by his solicitor sent a cheque for \$225 by way of rent for the months of October, November and December 1965 see Ex.A.10.

By a letter of the 11th February 1966 through his solicitor Ex.A.11 the appellant stated that a receipt for the \$225 would be sent. However, by his letter of the 14th February 1966 Ex.A.12 the appellant returned the cheque to the respondent and by another letter of the same date Ex.A.13 the appellant terminated the respondent's tenancy.

Under section 15(1)(a) of the Ordinance the respondent would lose the protection of the Control of Rent Ordinance if at the date of the notice terminating the tenancy rent was in arrears for 21 days or upwards and there was no tender thereof at or before such date. In this case the date terminating the tenancy was the 14th of February 1966, but before that date on the 11th February rent had been tendered; see Ex.A.11. The learned magistrate was right in holding that the claim in respect of the first ground failed.

With regard to appellant's claim that respondent had in breach of section 15(1)(j) accepted from his subtenants rent exceeding in the aggregate 75% of the rent paid by him this would depend on the amount of the rent paid in respect of the premises. On this point it is difficult to get a clear picture of the position.

There is no evidence of the date when respondent first went into occupation or of the rent agreed to be paid on such occupation. There is evidence that from 1962 until November 1963 the respondent was paying a monthly rental of \$105. In November 1963 the respondent through his solicitor wrote to the appellant Ex.D.11 that the rent for the period 1952 to 1960 should be \$56.25 and from 1961 to 1963 at \$60 per month. The respondent then demanded the return of excess rent amounting to \$1,485 for the period January 1960 to 1963 after deduction of the sum of \$180 in respect

A of 3 months rent for September, October, and November 1963. Nothing happened until by his letter of 7th December 1964 Ex.D.10 the appellant demanded rent for 15 months from September 1963 to November 1964 at a monthly rental of \$105.

B The respondent then commenced an action in Civil Suit No. K.2 of 1965 in the High Court at Kuching against the appellant for the excess rent paid. A consent order was obtained on 23rd September 1965 in these terms:—

C "THIS ACTION coming on for trial on the 16th day of March, 1965, and on the 23rd day of September, 1965, in the presence of Mr. T.O. Thomas of counsel for the plaintiff and Mr. George Seah of counsel for the defendant and upon hearing counsel for the plaintiff and the defendant, as aforesaid.

D BY CONSENT IT IS ORDERED THAT the defendant do refund to the plaintiff \$660.00 (Dollars six hundred and sixty) after taking into account all payments due to the defendant up to the end of September, 1965.

AND IT IS ORDERED THAT the defendant's counter claim be and is hereby dismissed.

IT IS FURTHER ORDERED THAT the defendant do pay to the plaintiff the taxed costs of the claim and the counter claim."

E Unfortunately, no attempt was made at the time of the said order to arrive at the amount of rent payable in respect of the premises, a circumstance which left the door open to further litigation in the proceedings before the learned magistrate.

F By his letter of the 18th October 1963 Ex. D.12 the president of the Rent Control Board stated that the standard rent was \$45 but that as a result of re-assessment of the premises in 1952 and 1961 the recoverable rents were in respect of the period 1952 to 1960 — \$56.25 and in respect of the period 1961 to 1963 \$60. On the 30th September 1965 the president of the Rent Control Board confirmed in his letter to respondent's solicitor that the current rent, that is the recoverable rent for the premises, was \$60 a month. By his letter of 23rd October 1965 Ex.A. the respondent wrote to the appellant if he would agree to rent at \$60 a month and that if he did, he could deduct the October rent from the \$60 payable under the said order of court. The appellant in two letters Ex.A.2 and Ex.A.3 declined to accept the sum of \$60 as the rent. It was only by his letters of the 8th and 28th of December 1965 Ex.A.5 and Ex.A.6 that he stated that \$45 was the rent. The learned magistrate came to the conclusion that the appellant although insisting upon higher rents in the beginning had later decided on the sum of \$45 in order to take advantage of the provisions of section 15(1)(j) to get the respondent evicted.

I He held from the wording of section 15 of the Ordinance that he had a general discretion to make an order for possession, and as the

appellant had come to court with unclean hands he refused possession. He then went on to say:—

"Assuming, however, that the rent was \$45 per mensem it is further necessary to find out what rents were received by the defendant from his subtenants excluding lighting and municipal and local authorities services paid by the tenant."

I take this to mean that the learned magistrate was saying that if he was wrong in holding that he had a discretion and if the monthly rent was \$45 whether there had been a breach of section 15(1)(j).

Excluding payment for lighting as there was no proof of any payment for municipal and local authorities services he found that the tenant was receiving \$42.13 from his subtenants which would certainly exceed in the aggregate 75% of the rent. Nevertheless, he held that there was no evidence that the respondent had paid a rent of \$45. All he did was to tender the sum of \$225 which was the rent for the months of September, October, and November.

In the opinion of the learned magistrate the words "tender" and "payment" could not be used as convertible terms. He therefore found that even on the above assumption there had been no breach of section 15(1)(j).

There was an appeal against the decision of the learned magistrate on the grounds that:—

- (1) The learned magistrate was wrong in holding that no rent was paid by the respondent/defendant.
- (2) On the evidence adduced before the court, the learned magistrate should have come to the conclusion or should have inferred that the respondent/defendant paid to the appellant/plaintiff rent at \$45 per month.

Williams J. who heard the appeal said rightly that it was only against the decision of the learned magistrate in respect of the claim under section 15(1)(j) of the Ordinance. He found that the magistrate had exercised his discretion and rejected it. He said:—

"There was no ground of appeal that the learned magistrate had no discretion whatsoever or if he had, he had exercised it wrongly."

He therefore dismissed the appeal.

In this appeal in addition to what is in effect the grounds of appeal before the court below, the appellant set out the following additional ground:—

- (1) The learned judge erred in law in dismissing the appeal and should have ordered a new trial or a retrial of the suit in the district court either before the same magistrate or before a new magistrate.

It is argued that this court cannot consider the question of discretion as it was not raised in the court below.

As a general proposition it is true that a point not raised in the court below cannot be considered on appeal. It would appear, however, from the authorities that in cases under the Rent Acts relating to the jurisdiction of the court to order possession the fact that a point was not taken in the court below does not preclude the tenant from relying on it.

In *Davies v. Warwick* ⁽¹⁾ at p. 313 Goddard L.J. observed:—

"It was said in the course of the argument that, as the proper question was not raised at the trial, it could not be taken on appeal If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it In cases in which possession is not sought there may well be points which must be taken in the court below, if it is desired to base an appeal upon them."

In *Selwyn v. Hamill* ⁽²⁾ at p. 71 it was objected that a point brought to the attention of the court was not raised in the court below. Tucker L.J. said:—

"In cases under the Rent Acts it is the duty of the court to be satisfied that all the requirements have been fulfilled before an order for possession is made. If they have not been satisfied the court has no jurisdiction to make an order. That is the result of *Davies v. Warwick*. Therefore, we are bound to take notice of this point if it is brought to our attention."

The same observation was made by Lord Greene M.R. in *Jackson Developments Ltd. v. Stemp* ⁽³⁾ at p. 603. With the above observations I respectfully concur. In my view the language of section 15 of the Ordinance does not confer on the court a general discretion to grant an order for possession on a claim founded on any one of the 15 sets of circumstances in section 15(1) paragraphs (a) to (o). It is only where a specific paragraph in the section expressly requires the court to consider the question of reasonableness that there is jurisdiction to exercise a discretion. In section 15(1) such paragraphs are paragraphs (b), (f) and (o). See the case of *Tham Sai Mooi v. M.S. Thaver* ⁽⁴⁾ and the two cases referred to therein *T. Mohammed v. V.E.A. Mohaideen* ⁽⁵⁾ and *Chen Chi Wei v. Khoh Keng Chong*. ⁽⁶⁾

I therefore hold that the learned magistrate had no jurisdiction to exercise a discretion.

That, however, does not conclude the matter. As I said earlier the question is whether the parties had agreed on the rent payable. The order dated 23rd September in Civil Cuit No. K.2 of 1965 merely set out the sum payable to the respondent after deducting what was due to the appellant up to the end of

September. As the action was to recover excess rent paid by the appellant the words "all payments due to the defendant" must relate to the rent of premises.

After the date of the order of the 23rd September the parties did not seem to have arrived at any definite agreement about the rent. The appellant refused the figure suggested by the respondent which was \$60. He said he would abide by the order of the Rent Board. Such an order could be made pursuant to an application under section 10 of the Ordinance. But no such application was ever made.

On the 8th of December the appellant, by his letter Ex.A.5 and also by his letter of the 28th December Ex.A.6, stated that the rent was \$45. By a letter of the 10th February 1966 Ex.A.10 through his solicitor the respondent accepted this figure but stated:—

"We accept your assurance that your client wants only the standard rent and that he has no intention of increasing the rent. We are advising our client to act on this assurance and you are no doubt aware that our client will have to adjust the rent of his subtenants taking into account the fact that rent of the whole premises is only \$45."

On the 11th of February 1966 the appellant in a letter through his solicitor said that there was no assurance that he would not increase his rent in the future. He also stated that a receipt would be sent for the \$225. On the 14th of February, however, he returned the cheque to the appellant and by another letter of the same date terminated the tenancy. The appellant made no reference whatever to the point raised in the respondent's letter that he was making a qualified acceptance of the rent of \$45 owing to adjustments necessary in the rents he was receiving from his subtenants.

Nothing happened until May 1966 when the appellant filed a suit claiming possession.

I find from the evidence that the parties had not arrived at any agreement as to the amount of rent. The order of the 23rd September left the matter open. There was no order of the Rent Board fixing rent. It was only by his letter of the 8th and confirmed by a letter of the 28th of December that the appellant himself fixed it at \$45 which was accepted by the respondent with a reservation regarding the rents he would receive from his subtenants. Nothing was said about this by the appellant and inferentially it must have been rejected as he filed a suit for possession. Owing to the absence of any agreement regarding the amount of rent the respondent cannot be held to have accepted from his subtenants rents exceeding 75% of the rent paid by him. In view of the state of affairs disclosed in this case the parties would be well advised to apply to the Rent Board to fix the rent.

A The appeal is dismissed but having regard to the course this case has taken there will be no order as to costs.

Azmi L.P. and MacIntyre F.J. concurred.

Appeal dismissed.

B

TOK JWEE KEE v. TAY AH HOCK & SONS LTD. & TOWN COUNCIL, JOHORE BAHRU

[F.C. (Azmi L.P., Suffian & MacIntyre F.J.J.) January 30, 1969]

C

[Johore Bahru—Federal Court Civil Appeal No. X.50 of 1968]

D

Local Authority — Building plans — Allegation that plans approved by Town Council contrary to provisions of Enactment — Whether Town Council liable to owner of adjoining land — Liability of owner of land on which building is built — Town Boards Enactment (Johore No. 118), s. 145 — Building By-laws, 1937, by-law 46.

E

In this case the appellant claimed a declaration that the approval of building plans by the Johore Town Council was contrary to the Town Boards Enactment and therefore illegal and inoperative. He also claimed damages against the council and also against the owner of the land on which the building was built. It was also alleged that there had been a breach of the building by-laws but the only damage alleged as a result of such breach was damage to the appellant's property from falling cement plasters etc.

F

Held: (1) the Town Council is liable to the appellant if in breach of the outright prohibition of section 145 of the Town Boards Enactment it passed the neighbour's building plan when it was not in conformity with the approved town plan and such breach results in damage to the plaintiff;

G

(2) the council is not liable to the plaintiff for breach of the by-laws, it not being alleged that the council has caused damage by negligence or trespass;

H

(3) the neighbour is liable to the plaintiff for breach of by-law 46 if and only if, the breach results in actual damage to the plaintiff and in any event, irrespective of whether the neighbour was in such breach or not, the neighbour is liable to the plaintiff for any damage caused by negligence and/or trespass.

I

Cases referred to:—

- (1) *J.R. Munday Ltd. v. London County Council* [1916] 2 K.B. 331 at p. 334.
- (2) *East Suffolk Rivers Catchment Board v. Kent & Anor.* [1941] A.C. 74 at p. 85.
- (3) *Ipoh Town Council & Anor. v. Ng Khoon Khoon* [1960] M.L.J. 227.
- (4) *Pasmore & Ors. v. The Oswaldtwistle Urban District Council* [1898] A.C. 387.
- (5) *Doe v. Bridges* (1831), 1 B. & Ad. 847 at p. 859
- (6) *Buttler & Anor. v. Fife Coal Co. Ltd.* [1912] A.C. 149.
- (7) *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398.
- (8) *Solomons v. R. Gertzenstein Ltd. & Ors.* [1954] 1 Q.B. 565.
- (9) *Solomons v. R. Gertzenstein Ltd. & Ors.* [1954] 2 Q.B. 243.